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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 367

RUSSELL LOUIS LAROSE,
Petitioner,

vs.

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Russell Louis LaRose, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review a judg-

ment of that Court entered on June 16, 1954, reversing the orders of the United States District Court for the Northern District of California, Southern Division, granting a petition for a writ of habeas corpus and ordering the petitioner discharged and released from the custody of the United States Army, said orders being entered on June 18, 1954, June 23, 1954, and June 24, 1954.

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1. OPINIONS BELOW.

The opinion of the District Court for the Northern District of California, Southern Division, granting the petition for writ of habeas corpus is unreported, but is set forth in the record, pages 9-10. It is also printed as Appendix A to this petition. The opinion of the Court of Appeals for the Ninth Circuit (R. 95-102)* is as yet unreported. It is printed as Appendix B to this petition.

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2. STATUTORY PROVISION SUSTAINING JURISDICTION.

The judgment of the Court of Appeals was entered on June 16, 1955 [R. 103; see also Appendix C to this petition].

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*All references to the Transcript of Record are designated by pages of it as follows: [R. 3]. A photocopy of the entire Selective Service File of petitioner was entered in evidence as Petitioner's Exhibit No. 1. The file is not part of the Transcript of Record but is before the Court. All references to the file are designated as pages of Exhibit 1 as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, ordinarily found at the top of each sheet of the Exhibit.

The final judgment of the Court of Appeals (denial of the seasonably filed petition for rehearing) was entered on July 25, 1955 [R. 105; see also Appendix D to this petition].

The petition for writ of certiorari is filed within the required 90 days' time for civil matters. The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district Court has jurisdiction under 18 U.S.C. §2241.

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3. QUESTIONS PRESENTED.

I.

The record shows that the local board after classifying the petitioner as an I-A-O the first time, received a letter from him stating, "I request *an appeal* of my classification. * * * If you recall my conscientious objector application, this is not the classification I desire, and not the classification I will be satisfied with" [Ex. 66, also R. 21-22].

The local board never transferred his file to the appeal board, as required by the regulations, but, instead, some six months later notified petitioner he had been reclassified as a student (II-S).

The question presented is whether the local board, after having received a notice of appeal, can deprive petitioner of his appeal by failing to forward the file to the appeal board. Also presented is whether a local board has the power or jurisdiction to reclassify a

registrant after an appeal has been taken from its decision.

II.

The record shows that after being classified as an I-A-O a second time by the local board, the petitioner within the time for appeal, went to that board in order to appeal his classification and was informed that it "wouldn't do any good to appeal" [R. 61-63]. Petitioner returned several times to the local board within the week following this classification and was told by the clerk of the board that if he didn't stop coming so often, he would be immediately drafted.

The record also shows that petitioner still within the time for appeal, talked with the Deputy State Selective Service Director and was informed that "an appeal would be absolutely useless". Petitioner did not file a written notice of appeal.

The question presented is whether the petitioner has been denied an appeal by reason of the fraud and misrepresentation of Selective Service officials. Also presented is whether the petitioner actually did take an appeal from his second classification as an I-A-O.

III.

Whether petitioner's actions in contacting his local board, after both classifications as I-A-O, were requests for personal appearances before the local board, which requests were not granted, thus depriving petitioner of procedural due process under the Act and the Regulations and the Fifth Amendment to the United States Constitution.

IV.

The record shows that petitioner consistently claimed that he should be classified as an I-O, a conscientious objector professing objections to all military training and service, both combatant and noncombatant. The local board never granted him an appeal and his case was never referred to the Department of Justice for an advisory recommendation.

The question presented is whether the local board by reason of its refusal to recognize petitioner's appeal from both classifications of I-A-O, has deprived him of a hearing conducted by a Hearing Officer of the Department of Justice, a copy of the recommendations of the Department of Justice, full, fair, and adequate summary of any adverse information in an F.B.I. report and an opportunity to rebut and reply to any adverse recommendation.

V.

The record does not disclose any evidence as to why the local board classified petitioner as an I-A-O rather than as an I-O as he requested. The petitioner never had a personal appearance before the local board.

The question presented was whether the classification as an I-A-O was arbitrary and without basis in fact.

VI.

The record shows that the government only appealed from the order of June 18, 1954, granting the

petition for a writ of habeas corpus and not from the subsequent orders made on June 23 and June 24, 1954, releasing and discharging the petitioner from the custody of the U. S. Army.

The question presented is did the Court of Appeals have any jurisdiction over the purported appeal, where no appeal was taken from the final order of the District Court.

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4. STATUTES AND REGULATIONS INVOLVED.

Section 1(c) of the Universal Military Training and Service Act [50 U.S.C. App. (Supp. V), Section 451(c)] is involved. Also, Section 6(j) of the Act must be considered [50 U.S.C. App. (Supp. V), Section 456(j), 65 Stat. 75, 83, and 86]. See also 28 U.S.C., Section 2253. Also involved are the Selective Service Regulations Sections 1622.11, 1622.14, 1622.25 (a) and (b)(8), 1624.1(a), 1625.2, 1626.2(a) and (c) (1) and (d), 1626.11(a), 1626.13, 1626.14, 1626.25 (a) (4), 1626.41 (32 C.F.R.). All are printed in Appendix E.

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5. STATEMENT OF THE CASE.

At the time the petition for a writ of habeas corpus was filed, April 21, 1954, the petitioner was a member of the United States Army, having been inducted on February 13, 1953, as an I-A-O (conscientious objector not opposed to noncombatant training and service). The petitioner repeatedly protested

this classification and his induction and consistently contended he was entitled to a classification as a conscientious objector opposed to all participation in military activities; an I-O.

His initial claim was made in his Classification Questionnaire (Ex. 8) which was on or about November 13, 1951.

The Questionnaire also revealed that petitioner was then a fulltime student at Deep Springs College (Ex. 2) but petitioner made no claim for a student deferment by filing the necessary supporting evidence.

The petitioner filed a conscientious objector form on or about November 21, 1951, in which he again reiterated his position that he was conscientiously opposed to participation in war in any form (Ex. 10-13). He was classified by the local board as an I-A-O on January 22, 1952 (Ex. 1).

On February 1, 1952, petitioner wrote the following letter to his local board:

> "I request an appeal of my classification. I received my notice of classification two days ago. It stated that I had been classified 1-A-O. If you recall my Conscientious Objector applications, this is not the classification I desire, and not the classification I will be satisfied with.
>
> "If you considered my C.O. application at its word, I do not see how this classification resulted. My objections are as sincere as possible, as those whom I recommended will, or have, testified.

"My views do not stem from a church or religious sect. I am a member of the Lutheran Church back home and this church is not registered as being opposed to going to war as we are. But I am a Christian. And if a Christian reads the life of Christ and accepts the fifth commandment, unqualified, he cannot help but refuse to kill for any reason whatsoever, self-defense or not.

"I have read the history of our nation, and find it a truly great history. And when I read what is was that inspired our nation's founders, 'the unalienable right to life'—iterated and reiterated throughout the growth of our national spirit, I too accept this freedom which has been held so close. Unalienable—that's what I consider the right to life, and whether North Korean soldier, kidnapper, rapist, murderer, or what, I believe their life, the most priceless, greatest possession one, all, can have, should not be taken away.

"And with this view how can I fill a noncombatant position? What is the ethical difference between pulling a trigger to release a bullet or sending an order to buy one, between releasing another to fight or fighting yourself? I see none.

"Please carefully reconsider your classification. I can ask of you nothing more."

The local board did not give him an appeal, nor prepare his file for transmittal to the appeal board (see 32 C.F.R. §§ 1626.13 and 1626.14).

The petitioner did not apply for a II-S (student) classification. He had, however, written a letter on

January 26, 1952 to his board, after being ordered to report for a physical examination in which he reiterated his conscientious objections to war, but in closing stated, "I would also like to know how, I, as a student, stand with your board disregarding my conscientious objections" (Ex. 63).

On July 23, 1952, some six months later he was notified he was classified as a student (Ex. 1). This classification was based on information supplied to the local board by officials of Deep Springs College, California, to the effect that petitioner was a full time student at that college (Ex. 53, 61).

The local board had been aware that petitioner was a student at the time it made its original classification of I-A-O by reason of his Classification Questionnaire (Ex. 2-9).

After receiving his II-S classification as a student, he visited the draft board "almost weekly" indicating he wasn't satisfied with the student's classification and wanted to receive the conscientious objector's classification (R. 59).

On September 13, 1952 the local board was advised by the Director of Deep Springs College that petitioner was no longer enrolled at the college (Ex. 45). On September 23, 1952 the local board changed his classification to I-A-O. Within two days thereafter, and for a period of days, petitioner went in person to his local board to protest his classification and was told that it wouldn't do him "any good to appeal it" and that if he didn't stop coming to the

local board and bothering the staff that they would draft him right away (R. 60-62). He was told he could go to see the State Selective Service Director and he attempted to do so, still within a week of his classification. He talked with the Deputy State Selective Service Director. He was told that "an appeal would be useless; they had just voted on it and had reached a conclusion" that he was an I-A-O, and that there was nothing petitioner could do about it but be drafted (R. 62). Relying on these statements of the local board and the Deputy State Selective Service Director, he did not file a written notice of appeal, nor a request for a personal appearance.

The petitioner never had a personal appearance and his case was never referred to the Department of Justice for a hearing before a hearing officer, and he at no time ever received a copy of the recommendations and resume of information on the sincerity of his conscientious objections.

On January 12, 1953 the petitioner was ordered to report for induction on February 13, 1953. He was inducted as a conscientious objector, available for non-combatant service only. He was assigned to Fort Sill, Oklahoma, for training in the field artillery at first, but after protesting that assignment was sent to a non-combatant one. Thereafter, he left his post (R. 48) and after being apprehended was transferred to the Presidio of San Francisco. He then petitioned for a writ of habeas corpus.

6. REASONS FOR GRANTING THE WRIT.

I.

An important question presented by this petition has not yet been determined by this Court, but should be. It is whether a local board after classifying a selective service registrant as an I-A-O, may deny him an appeal, even though he files a letter stating, "I request an appeal of my classification * * * If you recall my conscientious objector classification, this is not the classification I desire, and not the classification I will be satisfied with." The letter reiterates his conscientious objections to participation to war and in the armed forces as a non-combatant and ends with "Please carefully reconsider your classification." It did not include and was not accompanied by any new material not heretofore known to the local board (32 C.F.R. § 1625.2).

The Selective Service Regulations provide and the cases have held that registrants are not to be treated as if they were engaged in formal litigation assisted by counsel. See 32 C.F.R. § 1626.11 (Appendix E), *United States ex rel. Berman v. Craig,* 207 Fed. 2d 888; *Cox v. Wedemeyer,* 192 Fed. 2d 920. An appeal need not be in any particular form and should be liberally construed in favor of the registrants. Here there was a clear request for an appeal, which was not honored. The regulations provide that a registrant is not to be inducted while an appeal is pending (32 C.F.R. § 1626.41).

The Court of Appeals rules that the petitioner's letter was not an appeal, even though the word "ap-

peal" was used, but was instead a request for reopening and reconsideration, although it was accompanied by no new material. Therefore, a serious question is raised, if the letter was, in fact, an appeal, did it not deprive the local board of the power to reopen and reclassify the petitioner, and should it not have immediately transferred his file to the appeal board? (Section 1626.13). It also would appear that the decision of the Court of Appeals for the Ninth Circuit is at variance with a similar case in the First Circuit, *Chih Chung Tung v. United States,* 142 F. 2d 919.

II.

The undisputed evidence was that the petitioner, within the time for filing an appeal, after his second classification as an I-A-O, had gone to his local board to appeal his classification and was told it "wouldn't do any good to appeal" (R. 60-62). He was also told this by the Deputy State Director of Selective Service (R. 62).

Congress intended not only to guarantee a right of appeal to registrants but also to permit appeals freely and with a minimum of procedural formality (32 C.F.R. § 1626.2, *Chih Chung Tung v. United States,* 142 F. 2d 919).

By reason of the actions of the registrant, it is quite clear that he desired to appeal, and that the personnel of his local board and Selective Service officials were as fully informed of this intention, as if he had filed a written notice of appeal.

If the procedural rights guaranteed by the Act and Regulations may be thus negated by misrepresentations of responsible officials, they will have little value to registrants. If a registrant is told that it would be useless to appeal, as here, or threatened with punitive action for bothering the board, then it would appear, that he has been deprived of his procedural rights of appeal, irrespective of his failure to meet the technical requirement of filing a written notice. This important question has not yet been decided by this Court and should be.

This question should also be considered from one other view, and that is, that the petitioner did in fact file a valid appeal, even though unwritten, in accordance with the spirit of liberality with which appeals should be granted and recognized (see 32 C.F.R. 1626.11).

If it is true that an appeal is pending, petitioner was illegally inducted (see 32 C.F.R. 1626.41).

III.

In both instances after being classified as I-A-O, the petitioner indicated to the board that he was dissatisfied and wanted to do something about the classification. In neither case did the local board consider his efforts as the filing of an appeal. However, even if they felt that his efforts were not sufficient in that regard, they should have, at least, considered them as requests for personal appearances (32 C.F.R. § 1624). See *Talcott v. Reed,* 217 F. 2d 360; *United States v. Stiles,* 169 F. 2d 455.

IV.

The petitioner by reason of the local board's refusal to recognize his appeals, has been deprived of a hearing before a Department of Justice hearing officer, a copy of that Department's recommendations, a full, fair and adequate summary of any adverse information in the F.B.I. report made in investigating his claim, and an opportunity to rebut and reply to any adverse recommendation. Such a holding is in conflict with the recent cases of *Simmons v. United States,* 348 U.S. 397; *Gonzales v. United States,* 348 U.S. 407, and deprives him of due process of law. See *Sterrett v. United States,* 216 F. 2d 659; *Blevens v. United States,* 217 F. 2d 506; *United States v. Nelson,* 221 F. 2d 623.

V.

Nothing appears in the record to indicate why the petitioner was given an I-A-O classification rather than an I-O as he requested. Therefore a substantial question is involved as to whether the classification here is arbitrary and without basis in fact. *Jewell v. United States,* 208 F. 2d 770; *United States v. Hagaman,* 213 F. 2d 86.

VI.

The record shows (R. 12) that respondent appealed from the order of the District Court "issuing a writ of habeas corpus discharging Russell Louis LaRose from the custody of respondent * * * made and entered on the *18th day of June, 1954*" (emphasis added). However, on that day, the District Court merely granted the petition for the writ, thus bringing pe-

titioner into Court (R. 9-10). It wasn't until June 23rd and June 24th, that orders were issued discharging (R. 11) and releasing (R. 11) petitioner from the custody of respondent, and no appeals were taken from those orders.

In habeas corpus proceedings, appeals may only be taken from *final* orders (28 U.S.C. § 2253). *Collins v. Miller*, 252 U.S. 364; *United States, ex rel. Bauer v. Shaughnessy*, 178 F. 2d 756.

The important question thus is raised whether the Court of Appeals ever had the jurisdiction by reason of a faulty notice of appeal to review and reverse the orders of the District Court.

CONCLUSION.

This petition should be granted for one or more of the six reasons herein stated.

Dated, San Francisco, California,
August 24, 1955.

Respectfully submitted,
WAYNE L. COLLINS,
Counsel for Petitioner.

Of Counsel:
LAWRENCE SPEISER,
Staff Counsel,
American Civil Liberties Union of Northern California.

(Appendices A, B, C, D and E Follow.)

Appendix A

In the United States District Court for the Northern District of California, Southern Division

In the Matter of: The Petition of Russell Louis LaRose, *Petitioner,* vs. Lt. Gen. W. G. Wyman, Commanding Officer of the Sixth Army, *Respondent.*	No. 33,502

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS.

This matter having been heard, briefed and submitted for ruling,

The Court finds that petitioner submitted a letter to his draft board after it had classified him I-A-O, and that such letter constituted an appeal, thus depriving the local board of jurisdiction over petitioner; that no hearing was ever accorded petitioner on appeal, nor was any appeal granted, all of which constituted a denial of due process of law (*Knox v. United States,* 200 F. 2nd 398).

The Court further finds that even though petitioner's letter be construed as a request for reconsideration by his draft board, no hearing was ever accorded him pursuant to such request with respect to his basic classification of I-A-O (as distinguished

from a temporary deferment of II-S granted at the behest of petitioner's school head), thus denying him due process of law.

There is credible evidence that petitioner was wantonly beaten while confined at the Presidio in San Francisco. However, such treatment forms no part of the Court's consideration of this petition.

The petitioner may have his relief as prayed, upon preparation of findings of fact and conclusions of law.

It is Ordered that the petition for writ of habeas corpus be, and the same hereby is, Granted.

Dated: June 18, 1954.

/s/ George B. Harris.
United States District Judge.

[Endorsed]: Filed June 18, 1954.

Appendix B

United States Court of Appeals for the Ninth Circuit

Lieutenant General W. G. Wyman, Commanding Officer of the Sixth Army, Presidio of San Francisco, California, *Appellant,* vs. Russell Louis LaRose, *Appellee.*	No. 14,517 Jun. 16, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before MATHEWS and CHAMBERS, Circuit Judges, and BYRNE, District Judge.

MATHEWS, Circuit Judge.

Appellee, Russell Louis LaRose, a male citizen of the United States, was born on October 27, 1932 attained the age of 18 years on October 27, 1950, and was, on November 6, 1950, a resident of Milwaukee County, Wisconsin. On November 6, 1950, he registered with a local board of the Selective Service System namely Local Board No. 48 of Milwaukee

County. On October 31, 1951, the local board mailed him a classification questionnaire (SSS Form No. 100), which he returned to the local board on or about November 13, 1951. He did not, in or by that questionnaire, indicate what classification he desired. He did, however, sign the statement in Series XIV of that questionnaire. That statement was as follows:

"By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration."

Accordingly on or about November 16, 1951, the local board mailed appellee a conscientious objector form (SSS Form No. 150), which he returned to the local board on or about November 21, 1951. He did not sign either of the statements in Series I of that form,[1] nor did he, in or by that form, indicate what

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[1]Series I was as follows:

"Series I.—CLAIM FOR EXEMPTION.

"INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

"(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

.....

(Signature of registrant)

"(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore,

classification he desired. However, on January 22, 1952 the local board classified him I-A-O[2] and mailed him a notice of that classification (SSS Form No. 110). On February 5, 1952—14 days after mailing that notice—the local board received from appellee a letter dated February 1, 1952, reading as follows:

"I request an appeal of my classification. I received my notice of classification two days ago. It stated that I had been classified I-A-O. If you recall my Conscientious Objector application,[3] this is not the classification I desire, and not the classification I will be satisfied with.

"If you considered my C.O. application at its word, I do not see how this classification resulted. My objections are as sincere as possible, as those whom I recommended will, or have, testified.

"My views do not stem from a church or religious sect. I am a member of the Lutheran Church back home and this church is not registered as being opposed to going to war as we are. But I am a Christian. And if a Christian reads the life of Christ and accepts the fifth commandment, unqualified, he cannot help but refuse to kill for any reason whatsoever, self-defense or not.

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claim exemption from both combatant and noncombatant training and service in the Armed Forces.

(Signature of registrant)"

[2]Which is to say, it classified him as a conscientious objector available for noncombatant military service only. See 32 C.F.R. § 1622.11.

[3]Meaning, we suppose, his conscientious objector form (SSS Form No. 150).

"I have read the history of our nation, and find it a truly great history. And when I read what it was that inspired our nation's founders, 'the unalienable right to life'—iterated and reiterated throughout the growth of our national spirit, I too accept this freedom which has been held so close. Unalienable—that's what I consider the right to life, and whether North Korean soldier, kidnapper, rapist, murderer, or what, I believe their life, the most priceless, greatest possession one, all, can have should not be taken away.

"And with this view how can I fill a noncombatant position?[4] What is the ethical difference between pulling a trigger to release a bullet or sending an order to buy one, between releasing another to fight or fighting yourself? I see none.

"Please carefully reconsider your classification. I can ask of you nothing more."

Thus, in effect, appellee requested the local board to reopen his classification and consider it anew.[5] The local board did so and, on July 23, 1952, classified him II-S[6] and mailed him a notice of that classification (SSS Form No. 110). That classification was based on representations made to the local board by W. G. Greenman, director of Deep Springs College,[7]

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[4]Appellee had not previously indicated to the local board that he was opposed to participation in noncombatant training and service in the Armed Forces.

[5]See 32 C.F.R. §§ 1625.1-1625.4, 1625.11-1625.14.

[6]Which is to say, it classified him as a registrant deferred because of activity in study. See C.F.R. § 1622.25.

[7]A junior college at Deep Springs, California.

and by Robert D. Howard, dean of that college, to the effect that appellee was a full-time student at that college.[8] However, on September 13, 1952, Greenman wrote the local board a letter stating that appellee was no longer enrolled as a student at that college. Accordingly, the local board, on its own motion, reopened appellee's classification, considered it anew and, on September 23, 1952, classified him I-A-O and mailed him a notice of that classification (SSS Form No. 110). On January 12, 1953, the local board ordered him to report for induction. He did so report and, on February 13, 1953, was inducted as a conscientious objector available for noncombatant military service only. Thereafter he deserted, was apprehended and, while awaiting trial by court-martial, was detained in the custody of appellant, Lieutenant General W. G. Wyman, commanding officer of the Sixth Army at the Presidio of San Francisco, California.

While so detained, appellee, on April 21, 1954, filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus. Upon the filing of the petition, the District Court issued an order directing appellant to show cause on May 4, 1954, why a writ of habeas corpus should not be issued as prayed for.[9] The order to show

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[8]Such representations were made by Greenman in letters to the local board dated January 26, 1952 and June 17, 1952, and in a college student certificate (SSS Form No. 109) dated June 17, 1952, and by Howard in a college student certificate (SSS Form No. 109) dated March 20, 1952, and in a letter to the local board dated March 21, 1952.

[9]See 28 U.S.C.A. § 2243.

cause was served on appellant on April 26, 1954, but he did not, nor did anyone for him, make any return or answer thereto.[10] However, on May 7, 1954, hearings were had at which appellant was represented by counsel. Appellee was permitted to, and did, in person and by counsel, attend, participate in, and adduce evidence at the hearings. His evidence consisted of his Selective Service file and his own testimony. On June 18, 1954, the District Court made and entered the following order:

"This matter having been heard, briefed and submitted for ruling,

"The Court finds that petitioner [appellee] submitted a letter to his draft board[11] after it had classified him I-A-O, and that such letter constituted an appeal, thus depriving the local board of jurisdiction over petitioner; that no hearing was ever accorded petitioner on appeal, nor was any appeal granted, all of which constituted a denial of due process of law (*Knox v. United States,* 200 F. 2d 398).

"The Court further finds that even though petitioner's letter be construed as a request for reconsideration by his draft board, no hearing was ever accorded him pursuant to such request with respect to his basic classification of I-A-O (as distinguished from a temporary deferment of II-S granted at the behest of petitioner's school head), thus denying him due process of law.

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[10]See 28 U.S.C.A. §§ 2243 and 2248.

[11]In this order, the local board was called a draft board.

"There is credible evidence that petitioner was wantonly beaten while confined at the Presidio in San Francisco. However, such treatment forms no part of the Court's consideration of this petition.

"The petitioner may have his relief as prayed, upon preparation of findings of fact and conclusions of law.[12]

"It is ordered that the petition for writ of habeas corpus be, and the same hereby is, granted."

Although, as indicated above, the petition for a writ of habeas corpus was granted by the order of June 18, 1954, no writ of habeas corpus was ever issued in this case. However, on June 23, 1954, the District Court made and entered the following order:

"To Lieutenant General W. G. Wyman, or any other commanding officer of the Sixth Army, Presidio, San Francisco, California:

"It appearing on the return of the writ of habeas corpus allowed by this Court[13] that Russell Louis La-Rose was illegally inducted into the Army of the United States and is illegally detained by you as a member thereof,

"You are therefore hereby commanded forthwith to discharge him from your custody or control as a member of the Army of the United States."

On June 24, 1954, the District Court made and entered an order similar to the order of June 23,

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[12]So far as the record shows, no such findings or conclusions were ever prepared. If prepared, they were never filed.

[13]No such writ having been issued, there was, of course, no such return.

1954, except that the word "release," instead of "discharge," was used in the order of June 24, 1954. This appeal was taken on August 11, 1954.

The petition alleged that appellee's I-A-O classification of January 22, 1952, was "without basis in fact." However, the District Court did not so find, nor did the evidence warrant such a finding. Instead, the evidence showed that appellee's I-A-O classification of January 22, 1952, was based on his own statement in Series XIV of his questionnaire (SSS Form 100).[14]

The petition alleged, in substance, that appellee filed with the local board on February 1, 1952, a notice of appeal from his I-A-O classification of January 22, 1952; that the local board failed to transmit his Selective Service file to the appeal board; and that consequently his appeal was never considered. However, the District Court did not find that appellee filed a notice of appeal on February 1, 1952, nor did the evidence warrant such a finding. Instead, the evidence showed that no notice of appeal was filed by appellee on February 1, 1952, or at any other time.[15]

As indicated above, the District Court found that appellee "submitted a letter to [the local board] after it had classified him I-A-O," and that "such letter constituted an appeal,[16] thus depriving the local board

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[14]This appeared from appellee's Selective Service file, put in evidence by appellee himself.

[15]Such a notice, if filed, should have been, and presumably would have been, placed in appellee's Selective Service file. However, that file contained no such notice.

[16]Meaning, we suppose, that it constituted a notice of appeal. See 32 C.F.R. § 1626.11.

of jurisdiction over [appellee]." The evidence showed that appellee submitted four letters to the local board after his I-A-O classification of January 22, 1952—the letter dated February 1, 1952, and three others—but none of the four letters constituted an appeal or a notice of appeal.

It is true that the word "appeal" was used in the letter dated February 1, 1952, but the context clearly showed that appellee was not thereby taking an appeal, but, was, in effect, requesting the local board to reopen his classification and consider it anew[17] which the local board did. Furthermore, the letter dated February 1, 1952, was not received by or filed with the local board until February 5, 1952—four days after the expiration of the time for appealing from appellee's I-A-O classification of January 22, 1952.[18]

As indicated above, the District Court found that "even though [appellee's] letter be construed as a request for reconsideration by [the local board], no hearing was ever accorded him pursuant to such request," meaning, we suppose, no hearing attended by appellee in person. No such hearing was requested by appellee,[19] nor was he in any way prejudiced by the failure to accord him such a hearing. The reconsideration requested and obtained by him resulted in his being put in a lower class (II-S instead of I-A-O, thus benefiting instead of prejudicing him.

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[17]Cf. United States v. Vincelli, 2 Cir., 215 F. 2d 210.

[18]See 32 C.F.R. § 1625.2.

[19]See 32 C.F.R. §§ 1624.2 and 1625.13.

It should be noted that the local board's order of January 12, 1953—the order requiring appellee to report for induction—was not based on and did not result from his I-A-O classification of January 22, 1952, but was based on and resulted from his I-A-O classification of September 23, 1952—a classification not mentioned or referred to in the petition or in any of the District Court's orders. Appellee did not appeal from his I-A-O classification of September 23, 1952, nor did he, on September 23, 1952, or at any time thereafter, request the local board to reopen his classification or to consider it anew. In short he failed to exhaust his administrative remedies and hence was not entitled to seek relief in the District Court.[20]

We conclude that, in granting the petition and in ordering appellee discharged and released from appellant's custody, the District Court erred.

Accordingly, the orders of June 18, 1954, June 23, 1954, and June 24 1954, are reversed and the case is remanded to the District Court with directions to enter an order discharging the order to show cause and remanding appellee to the custody of appellant or any other commanding officer of the Sixth Army.

(Endorsed:) Opinion. Filed Jun. 16, 1955.
Paul P. O'Brien, Clerk.

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[20] Williams v. United States, 9 Cir., 203 F. 2d 85; Skinner v. United States, 9 Cir., 215 F. 2d 767; Mason v. United States, 9 Cir., 218 F. 2d 375.

Appendix C

United States Court of Appeals
for the Ninth Circuit

Lieutenant General W. G. Wyman, Commanding Officer of the Sixth Army, Presidio of San Francisco, California, *Appellant,* vs. Russell Louis LaRose, *Appellee.*	No. 14,517

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Orders of the said District Court in this cause be, and hereby are reversed, and that the said cause be, and hereby is remanded to the said District Court, with directions to enter an order discharging the order to show cause

and remanding appellee to the custody of appellant or any other commanding officer of the Sixth Army.

(Endorsed) Judgment

Filed and Entered: June 16, 1955,

Paul P. O'Brien, Clerk.

Appendix D

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, July 25, 1955

Before MATHEWS and CHAMBERS, Circuit Judges, and BYRNE, District Judge.

ORDER DENYING PETITION FOR REHEARING.

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellee, filed July 16, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

Appendix E

STATUTES AND REGULATIONS INVOLVED.

Section 1(c) of the Act.

Section 1(c) of the Universal Military Training and Service Act (50 U.S.C. App. (Supp. V) §451 (c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, §1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, §1 (a), 65 Stat. 75.

Section 6(j) of the Act.

Section 6(j) of the act (50 U.S.C. App. (Supp. V) § 456 (j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical

views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice

shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U.S.C. App. (Supp. V) § 456 (j), 65 Stat. 75, 83, 86.

28 U.S.C. Section 2253.

28 U.S.C. Section 2253 provides:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had."

Section 1622.11 Class I-A-O.

Section 1622.11 provides:

"Conscientious Objector Available for Noncombatant Military Service Only.—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

Section 1622.14 of the Regulations.

Section 1622.14 of the Selective Service Regulations (32 C.F.R. § 1622.14 (1951 Rev.)) provides:

"Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1622.25 Class II-S.

Section 1622.25 Class II-S provides:

"Registrant deferred because of activity in study. (a) In Class II-S shall be placed any registrant whose activity in study is found to be necessary to the maintenance of the national health, safety, or interest. (b) (8) The registrant has successfully completed his first year at a college, university, or similar institution of learning and achieved a scholastic standing on his first year's work which ranked him for that year within the upper one-half of the full-time male students in his class or has attained a score of 70 or more on the qualification test referred to in sub-paragraph (3) of this paragraph, and has been accepted for admission by a college, university, or similar institution of learning to the second-year class next commencing for a full-time course of instruction or has entered upon and is satisfactorily pursuing such course."

Section 1624.1 of the Regulations.

Section 1624.1 of the Selective Service Regulations (32 C.F.R. 1624.1 (1951 Rev.)) provides:

"Opportunity to appear in person. (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of

Classification (SSS Form No. 110) to him. Such 10-day period may not be extended."

Section 1625.2 of the Regulations.

Section 1625.2 of the Selective Service Regulations (32 C.F.R. § 1625.2 (1951 Rev.)) provides:

"When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), *unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."* (Emphasis added).

Section 1626.2 of the Regulations.

Section 1626.2 of the Selective Service Regulations (32 C.F.R. § 1626.2 (1951 Rev.)) provides:

"*Appeal by registrant and others.* (a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition. (c) (1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110). (d) At any time prior to the date the local board mails to the registrant an Order to Report for Induction (SSS Form No. 252), the local board may permit any person described in paragraph (c) of this section to appeal even though the period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board thereafter permits an appeal, the right of such persons to appeal shall expire at the end of the period provided for in paragraph (c) of this section. If an extension of time to appeal is granted by the local board, a record thereof shall be entered on the Classification Questionnaire (SSS Form No. 100) under the heading 'Minutes of Actions by Local Board and Appeal Board.'"

Section 1626.11 of the Regulations.

Section 1626.11 of the Selective Service Regulations (32 C.F.R. § 1626.11 (1951 Rev.)) provides:

"*How appeal to appeal board is taken.* (a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal."

Section 1626.13 of the Regulations.

Section 1626.13 of the Selective Service Regulations (32 C.F.R. § 1626.13 (1951 Rev.)) provides:

"*Local board to prepare appeal record and forward file.* (a) Immediately upon an appeal being taken to the appeal board by a person entitled to appeal, the local board shall prepare the Individual Appeal Record (SSS Form No. 120) in duplicate, attaching the original to the inside of the registrant's Cover Sheet (SSS Form No. 101) and placing the duplicate copy in the local board files."

Section 1626.14 of the Regulations.

Section 1626.14 of the Selective Service Regulations (32 C.F.R. § 1626.13 (1951 Rev.)) provides:

"*Time when record to be forwarded on appeal.* The registrant's file shall be forwarded to the appeal board, or appropriate panel thereof, immediately after the local board has complied with the provisions of

§ 1626.13, but in no event later than five days after the appeal is taken. The local board shall enter in the Classification Record (SSS Form No. 102) the date it transmits the registrant's file to the appeal board board or appropriate panel thereof."

Section 1626.25 of the Regulations.

Section 1626.25 of the Selective Service Regulations (32 C.F.R. § 1626.25 (1951 Rev.)) provides:

"*Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action: (4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice."

Section 1626.41 of the Regulations.

Section 1626.41 of the Selective Service Regulations (31 C.F.R. § 1626.41 (1951 Rev.)) provides:

"*Appeal postpones induction.* A registrant shall not be inducted either during the period afforded him to take an appeal to the appeal board or during the time such an appeal is pending."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 367

RUSSELL LOUIS LAROSE, PETITIONER

v.

LIEUTENANT GENERAL W. G. WYMAN, OR ANY OTHER COMMANDING OFFICER OF THE SIXTH ARMY, PRESIDIO, SAN FRANCISCO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. iii–xii; R. 95–102) is reported at 223 F. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1955 (Pet. App. xiii–xiv; R. 103) and a petition for rehearing was denied on July 25, 1955 (Pet. App. xv; R. 105). The petition for a writ of certiorari was filed on September 1, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner was deprived of administrative procedural rights under the Universal Military Training and Service Act.

REGULATIONS INVOLVED

The pertinent Selective Service Regulations (32 C. F. R. (1951 ed.)) are set forth in the Appendix *infra*, pp. 15–18.

STATEMENT

In April 21, 1954, in the United States District Court for the Northern District of California, petitioner filed a petition for a writ of habeas corpus challenging the validity of his detention by the United States Army for trial by court-martial for desertion. He alleged that on January 22, 1952, he was unlawfully and without basis in fact classified I–A–O (eligible for noncombatant military service only) under the Universal Military Training and Service Act; that on February 1, 1952, within the time provided by law, he filed a notice of appeal from said classification, that no appeal was granted, and hence that the classification and the induction order under which he was inducted were void (R. 3–8).

At the hearing on the petition, petitioner's selective service file was introduced in evidence as Government Exhibit 1 (R. 17). Pertinent facts from such exhibit are as follows:

In his classification questionnaire filed on November 13, 1951, with Local Board No. 48 in

Milwaukee County, Wisconsin, petitioner stated that he was born on October 27, 1932; that he was a full-time student preparing for aeronautical engineering at Deep Springs Jr. College, Deep Springs, California; and that he was conscientiously opposed to participation in war in any form (F. 2–9).[1]

In November 1951, petitioner executed SSS Form No. 150 for conscientious objectors in which he stated that he believed "in a Divine Being" and that "force may be used only to prevent something beyond force, namely homicide, and then only if prevents it without homicide on its own part"; that he and his parents were members of the Lutheran faith which requires participation in the defense of one's country when called upon to do so; and that his conscientious opposition to war was a matter of his own interpretation of the Christian doctrine and his own personal philosophy. Petitioner did not indicate, as required by the questions in Series I of the form, whether he was opposed merely to combatant service or to both combatant and noncombatant service (F. 10–13).

On January 22, 1952, petitioner was classified I–A–O. Notification of such classification on Form 110 was mailed to him and he was ordered to report for the armed forces physical examination (F. 9).

[1] The designation "F" refers to Exhibit 1.

On January 26, 1952, petitioner wrote to the Milwaukee board stating that he believed that his order to report for a physical examination was in error since to his knowledge he had not even been classified; that if he had been classified as eligible for induction that classification was in error since he was conscientiously opposed to war; and that he was a student at Deep Springs College. He added that he would "like to know how I, as a student, stand with your board, disregarding my conscientious objections" (F. 62–63). On the same date, the Director of the College notified the board that petitioner was a full-time student in good standing (F. 61).

On February 1, 1952, petitioner wrote the board saying "I request an appeal of my classification". He stated that he had received notice of his I–A–O classification; that he was not satisfied with it; that his conscientious objection stemmed from the Fifth Commandment and from the teachings of the founders of this country of the "inalienable right to life" by all; and that he was opposed to noncombatant as well as combatant military service. He ended by saying: "Please, carefully reconsider your classification. I can ask of you nothing more" (F. 66–67).

On April 22, 1952, petitioner's classification was reopened and he was reclassified II–S (student deferment) until June, 1953 (F. 9, 46–54). Pe-

titioner was notified of this classification on Form 110 on July 23, 1952 (F. 9).

On September 13, 1952, the Director of Deep Springs College advised the draft board that petitioner was no longer enrolled at the college for the current academic year (F. 45). On September 23, 1952, the draft board on its own motion reopened petitioner's classification, reclassified him I–A–O and notified him accordingly on Form 110 (F. 9). On October 3, the Deputy State Director for Selective Service requested petitioner's file for "an opportunity to review his case" (F. 44). The file was sent to him on October 6 and he returned it on October 10 (F. 42–43). The file does not show the reason for this request.

On October 20, 1952, petitioner was ordered to report for a physical examination on November 12, 1952 (F. 41), and was found acceptable (F. 9). In December 1952, in reply to the board's letter for information, petitioner replied that he was not employed or attending school on a full-time basis, but that he was "engrossed in a full time independent education on my own" and planned to continue this self-education (F. 28–30). On January 12, 1953, petitioner was ordered to report for induction on February 13, 1953 (F. 27). He was inducted into the Army on that date (F. 25).

On April 3, 1953, petitioner left camp without leave. He was apprehended and returned to the

camp on April 14, 1953, and on April 23, 1953, left again without leave. He was apprehended in January 1954 and placed in the custody of the Army awaiting court-martial on desertion charges (R. 4, 6; F. 22).

At the habeas corpus hearing, petitioner testified that, after he received the second I–A–O classification on September 23, 1952, he went to the board within one day and told the clerk in charge that he was dissatisfied with his classification and wished action taken on it; that the clerk replied that "it wouldn't do you any good"; that he returned every day for a few days thereafter with the same complaint; that he was not allowed to talk to the board members, but was finally told to talk to the Deputy State Director; that within a week following his reclassification on September 23, petitioner saw the Deputy State Director and told him that he wished his case to be "reconsidered"; that the Deputy State Director told petitioner that "an appeal would be useless, they had just voted on it and had reached a conclusion I [petitioner] was I–A–O, and nothing more, and there was nothing I [petitioner] could do about it but be drafted"; and that, relying on these statements from the Deputy State Director and from the clerk, petitioner took no appeal (R. 60–63). He also testified that after his induction into the armed forces, he was placed in an artillery unit and given a weapon;

that when he refused to have anything to do with that type of training, he was placed on latrine duty temporarily while they checked his records; and that he was then transferred to Camp Pickett, Virginia. While at camp he talked with several chaplains about his position. He testified that he finally deserted because of his conscientious scruples (R. 47–48).

The District Court on June 18, 1954, granted the petition for a writ of habeas corpus (R. 10). By orders dated June 23 and June 24, it ordered petitioner released from custody (R. 11–12). On appeal, the Court of Appeals reversed the order of the District Court, holding that petitioner had failed to exhaust his administrative remedies under the Selective Service System.

ARGUMENT

1. Petitioner attacks (Pet. 11–13) the validity of the induction order dated January 12, 1953, under which he was inducted into the armed forces. Specifically, he challenges the validity of the I–A–O classifications which he received on January 22, 1952, and on September 23, 1952, on the ground that he was deprived of his administrative right of appeal from these classifications under the Universal Military Training and Service Act.

Petitioner's challenge (Pet. 11–12) of his I–A–O classification by the local board on January 22, 1952, is irrelevant to this action. As the

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Court of Appeals pointed out (Pet. App. xii; R. 100-101), the induction order which he is attacking in his petition for a writ of habeas corpus did not result from that classification. His request in his letters of January 26 and February 1, 1952, which were more like requests for a reconsideration of that classification than for appeal, did result in reconsideration and in a lower classification (II-S) which deferred him from military service. He did not appeal from this lower classification.

Although the District Court held petitioner's letter of February 1, 1952, "constituted an appeal" which deprived the local board of further jurisdiction over his case (R. 9), the Court of Appeals correctly held to the contrary that this letter was a request for reconsideration by the local board (R. 101). While the letter began with the statement "I request an appeal of my classification", it ended with "Please carefully reconsider your classification" (Statement, *supra*, p. 4). At the very least, the local board was entitled to treat the letter as a request for *its* reconsideration. Cf. *United States* v. *Vincelli*, 215 F. 2d 210 (C. A. 2). This is emphasized by the fact that only a few days before the local board had received from petitioner and the director of his college information indicating that he desired and was eligible for a student deferment (Class II-S). Since Sections 1623.2 and 1626.25 (a) (2) require both

local and appeal board to classify a registrant in the lowest class for which he is eligible. (App., *infra*, pp. 15, 17–18), and since class II–S is lower than the conscientious objector classifications, the local board properly placed petitioner in Class II–S as a student.

Thus, the issue here is whether the circumstances surrounding the second I–A–O classification in September 23, 1952, which resulted in his induction into the armed forces, amounted to a deprivation of his administrative right to appeal.[2] Petitioner argues (Pet. 12–13) that the uncontroverted evidence shows that he was deprived of his right by the local board and the Deputy State Director in September and October, 1952. Petitioner's own version of the events (R. 61–63) does not support that conclusion. From his own testimony, it is clear that the State Director did not advise him that he could not appeal. The most that the evidence indicates is that petitioner was told both by the clerk and the Deputy Director that he would not be successful in his appeal. Even if petitioner's testimony be taken at full face value, it seems clear that those statements were undoubtedly made in response to petitioner's request for an opinion as to the probable outcome of an appeal, preliminary to his determining whether to appeal.

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[2] The District Court made no findings with respect to this second I–A–O classification.

There is no evidence that petitioner was unaware of his right to appeal. He did not need advice on that score. He was a college student; his letters to the draft board which appear in the selective service file show that he was an educated, intelligent person who was quite familiar with his rights under the Universal Military Training and Service Act; his own testimony reveals his awareness of that right; and the special form for conscientious objectors, SSS Form No. 150, which was sent to petitioner and which he executed and returned to the board, specifically states that the regulations provide for an appeal. More particularly, petitioner received three Form 110 notices of his classification, while his case was before the local board (see F. 9). Each such notice specifically informed him of his right to appeal within ten days. In addition, the fact that petitioner submitted to induction and remained in the Army for several months before he deserted tends to support the conclusion that his decision not to appeal was a deliberate one, which he reconsidered only after being charged with desertion. Accordingly, petitioner has made no showing that he was deprived of his administrative rights.[3]

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[3] Petitioner suggests (Pet. 13) that his efforts should have at least entitled him to a personal appearance before the local board. SSS Regulations, section 1624.1, provides that all such requests shall be in writing—which petitioner certainly did not do. By no stretch of the imagination,

Since petitioner did not appeal, he was not entitled to a hearing before the Department of Justice, in accordance with the provisions of SSS Regulations, section 1626.25. And having failed to exhaust his administrative remedy by appeal, he has no standing to contest the validity of his classification (see Pet. 14). *Falbo* v. *United States,* 320 U. S. 549; *United States* v. *Balogh,* 157 F. 2d 939 (C. A. 2), vacated on the authority of the *Falbo* decision, 329 U. S. 692; *United States* v. *Kalpakoff,* 217 F. 2d 748 (C. A. 9), certiorari denied, 348 U. S. 982; *Skinner* v. *United States,* 215 F. 2d 767 (C. A. 9), certiorari denied, 348 U. S. 981. See also the Government's brief in opposition in *Palmer* v. *United States,* No. 328, this Term, now pending on petition for a writ of certiorari.

2. It is also highly doubtful whether petitioner can in this action, while being held for court-martial for desertion after a substantial period of service, attack the validity of the selective service process under which he was inducted into the army.

This Court in *Gibson* v. *United States,* 329 U. S. 338, permitted Gibson to attack an allegedly invalid classification in a prosecution under the Selective Training and Service Act of 1940 for

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can his claimed conversations with the clerk at the local board be deemed to be oral requests for personal appearances.

unlawfully deserting a conscientious objector's camp. In *Billings* v. *Truesdell*, 321 U. S. 542, it permitted Billings in a habeas corpus remedy to challenge his detention by the Army pending court-martial proceedings for refusal to obey an Army order. But these cases are clearly distinguishable from the instant case. In *Billings*, this Court found that Billings had never been inducted into the Army and thus had no occasion to consider the nature of the duties which would have been his if he had submitted to induction. Gibson's case was processed by the Selective Service System prior to this Court's clarification in *Estep* v. *United States*, 327 U. S. 114, decided during the pendency of the *Gibson* case before this Court, of a registrant's right of judicial review of his classification. Hence his right to challenge his classification prior to induction was not clear. In addition, since Gibson was taken into a conscientious objector's camp rather than inducted into the Army, he was not subject to military jurisdiction, unlike the petitioner here. Uncertainty as to how Gibson could attack his classification even at that point, because he was still a civilian, and the fact that the decision would not result in undue interference with the administration of the armed forces, led to this Court's decision in favor of Gibson. None of those conditions is present here. Petitioner is under the jurisdiction of the military and he had

an opportunity to challenge his classification prior to his induction or immediately thereafter.[4]

Moreover, Gibson stayed in the camp for only five days before he departed without leave. In that connection, this Court said (*Gibson* v. *United States, supra,* at pp. 361–362), that it did not express any opinion "whether a different result might follow for one in Gibson's position if he should remain at the camp for a substantially longer period and then depart without leave." This is precisely what happened here. Petitioner was in the Army from February 13, 1953, until April 1953, before he deserted for the first time.[5] Petitioner's failure to take prompt action to seek his release from military service should preclude

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[4] It has been held that a registrant who was inducted into the armed forces under the 1917 Act could not desert and thereafter seek to escape the consequences of his desertion, as petitioner is seeking to do here, by contending that he was in fact exempt from military service and should not have been inducted. *Ex parte Kerekes*, 274 Fed. 870 (E. D. Mich.); *Ex parte Tinkoff*, 254 Fed. 912 (D. Mass.); *Ex parte Romano*, 251 Fed. 762, 764 (D. Mass.); *contra*, under the 1940 Act, in what we believe to be a misunderstanding of the *Gibson* case, *Cox* v. *Wedemeyer*, 192 F. 2d 920 (C. A. 9).

[5] Petitioner argues that the government, by appealing from the District Court's order of June 18, 1954, rather than from the orders of June 23 and June 24 did not appeal from the final order, and hence that the Court of Appeals did not have jurisdiction. The case had however reached finality on June 18. The June 23 and 24 orders merely implemented the June 18 order which decided the merits of this case (see Statement, *supra*, p. 7). The appeal was timely even if the notice should have referred more correctly to the later orders.

the granting of judicial relief. *Ex parte Blazekovic,* 248 E. D. 327 (Fed. Mich.) (2 months); *Mayborn* v. *Heflebower,* 145 F. 2d 864 (C. A. 5) (2½ months); *Sanford* v. *Callan,* 148 F. 2d 376 C. A. (5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

SELECTIVE SERVICE REGULATIONS

§ 1623.2 *Consideration of classes.* Every registrant shall be placed in Class I–A under the provisions of § 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I–A–O considered the highest class and Class I–C considered the lowest class according to the following table:

Class:

I–A–O	IV–A
I–O	IV–B
I–S	IV–C
II–A	IV–D
II–C	IV–F
II–S	V–A
I–D	I–W
III–A	I–C

* * * * *

§ 1624.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classifica-

tion (SSS Form No. 110) to him. Such 10-day period may not be extended.

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§ 1625.1 *Classification not permanent.* (a) No classification is permanent.

* * * * *

§ 1625.2 *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant * * * (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

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§ 1625.13 *Right of appeal following reopening of classification.* Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

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§ 1626.2 *Appeal by registrant and others.* (a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of

the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition.

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(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110).

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§ 1626.11 *How appeal to appeal board is taken.* (a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

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§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

* * * * *

(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I–A–O or in Class I–A–O,

the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

* * * * *

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. * * *

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§ 1626.41 *Appeal postpones induction.* A registrant shall not be inducted either during the period afforded him to take an appeal to the appeal board or during the time such an appeal is pending.

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